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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 224

GENERAL ELECTRIC COMPANY, *Petitioner*

v.

MASTERS MAIL ORDER COMPANY OF WASHINGTON, D. C., INC., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTRODUCTORY STATEMENT

This case concerns the right of respondent, a vendor located in the District of Columbia, a non-fair trade jurisdiction, to make interstate mail order sales and to advertise, at less than fair trade prices, to customers in fair trade states. Specifically, petitioner asserts that its resale price-fixing agreements signed by New York vendors, pursuant to New York's Fair Trade Law, are binding upon respondent, a "non-signer", in its transactions with New Yorkers. The decision below held otherwise, on the primary ground

that with respect to such transactions, the McGuire Act, outlined below, did not interdict the Sherman Act's ban against price-fixing agreements.

STATUTES INVOLVED

The statutes involved are the New York Fair Trade Law, known as the Feld-Crawford Act (New York General Business Law, § 369-a to 369-e, inclusive) and the amendment to Section 5 of the Federal Trade Commission Act, known as the McGuire Act (66 Stat. 632, 15 U.S.C. § 45(a)(1)-(5), inclusive). They are respectively set forth in complete text at pages 25-27 and 22-24 of the Appendix to the Petition for Certiorari (hereafter Pet. —) and therefore will not be reproduced here in full.

So far as material these statutes provide as follows:

(i) *Feld Crawford Act*

§ *369-a:* "No contract relating to the sale or resale of a [trademarked] commodity . . . shall be deemed in violation of any law of the State of New York by reason of . . . provisions . . . [t]hat the buyer will not resell . . . except at the price stipulated by the vendor; . . ."

§ *369-b:* "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

(ii) *McGuire Act*

Subsection 5(a)(2): That the federal Antitrust Acts do not prohibit "contracts or agreements pre-

scribing minimum or stipulated prices . . . for the resale of a [trademarked] commodity . . . when . . . lawful as applied to intrastate transactions under any statute . . . in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale."

Subsection 5(a)(3): That the federal Antitrust Acts do not forbid "the exercise . . . of any right or right of action created by . . . any State [against] willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in *such* contracts or agreements . . ."

Subsection 5(a)(4): That "[n]either the making of contracts or agreements *as described in paragraph (2) of this subsection,* nor the exercise or enforcement of any right or right of action *as described in paragraph (3) of this subsection* shall constitute an unlawful burden or restraint upon, or interference with, commerce" (emphasis supplied).

THE OPINIONS BELOW

The opinion of the District Court is reported in 145 F. Supp. at 57-64. That Court ruled that respondent was subject to the New York Fair Trade Act in selling and advertising to New Yorkers because of its "contacts" with New York, principally its ownership by, and common management with, a New York corporation.

The Court of Appeals for the Second Circuit reversed the trial court, with one judge dissenting. It held that petitioner's New York agreements did not cover respondent's interstate sales to New York customers or advertising pertaining thereto, because the McGuire Act validated state-authorized price-fixing

contracts only as to "resales" occurring in a fair trade state, whereas respondent's "resales", within the meaning of the federal law, occurred in the District of Columbia, a free jurisdiction (Pet. 32-33, 35, 41-42).

The two majority judges agreed that respondent was engaged in the bona fide conduct of an "extensive" retail business in the District of Columbia (*id.* at 34 n. 4, 47). They likewise concurred that respondent's New York "contacts", invoked by the trial court and the dissenting appellate judge as a basis for subjecting its dealings with New Yorkers to fair trade control, were immaterial for purposes of the McGuire Act (*id.* at 34-35, 46-47).

There was one difference in rationale between the majority judges. This concerned the meaning of the reference to the "resale" jurisdiction in subsection 2 of the McGuire Act. Chief Judge Clark felt that in applying this standard, "the place where title passed is critical", provided it "has a direct and substantial relation to the transaction" (*id.* at 35, 40). Judge Waterman considered that Congress intended the reference "to mean the place where the seller of the goods is located" (*id.* at 42, 45).

The Chief Judge further ruled that "[q]uite apart from the McGuire Act, the same result is compelled by New York law" (*id.* at 37), whether New York "regarded the place where title passes as critical . . . or saw the retailer's location as controlling" (*id.* at 38). The concurring opinion stated that "[i]n view of [the author's] understanding of the McGuire Act, [he did] not find that the New York Feld-Crawford Act has any applicability to the situation before us here" (*id.* at 46).

The dissenting judge below adopted the trial court's view that respondent's sales occurred in New York because of its New York "contacts", notably its ownership by a New York corporation, and that it therefore was governed by New York fair trade requirements (*id.* at 48-50).

QUESTIONS PRESENTED

So far as the decision below treated the issues, the questions involved are these:

1. Is the operator of a retail store located in the District of Columbia, where there is no fair trade law, required by the McGuire Act to comply with the terms of price-fixing agreements, effected under New York law, in determining the prices he will charge and advertise to New Yorkers for goods purchased by interstate mail orders received, accepted and filled in the District of Columbia?

2. Does the New York Fair Trade law itself cover such transactions?

The following additional questions were raised below but were not treated by the decision:

(a) Is such an application of the New York Fair Trade Act barred by Article I, Section 8, Clause 17, of the Constitution of the United States, vesting exclusive legislative power over the District of Columbia in the Congress of the United States, and the Supremacy Clause, Article VI, Clause 2, of that Constitution?

(b) In any event, is such extraterritorial application of the New York statute barred by the Commerce Clause, Article I, Section 8, Clause 3, of the Constitu-

tion of the United States and by the Due Process Clauses of the Fifth and Fourteenth Amendments to that Constitution?

COUNTER-STATEMENT OF THE CASE

The case was tried exclusively on stipulated evidence establishing the following undisputed facts:

1. Respondent has only one business establishment. This is a retail store in Washington, D. C., consisting of a basement, main floor and two upper stories. It was opened in March 1954. The store has a fulltime staff of employees, including a supervisor. It carries an inventory of goods, including those of petitioner General Electric (GE), which is available for sale both over-the-counter and by mail. In fact more than two-thirds of respondent's sales are made to over-the-counter customers. (R(I) 25-26; ¶¶ 13, 17, 19).[1]

2. When this action was filed, in May 1954, respondent was a Maryland corporation. As of October 18, 1954, before trial of this case, that corporation was dissolved and was succeeded by a District of Columbia corporation of the same name. The reincorporation was undertaken in June 1954, after Congress, in that same month, had passed a modern corporation law for the District of Columbia. Respondent is wholly-owned by Masters, Inc., a New York retailer. (R(I) 24-25; ¶¶ 10, 12).

3. Respondent acquired GE products in part from its parent, but principally from GE's franchised dis-

[1] The record in this Court includes Appellants' (Masters') Appendix below, designated as Volume I in the certified Record and hereafter referred to as R(I) —, and Appellee's (GE's) Appendix below, designated as Volume II and hereafter referred to as R(II) —.

tributors in the District of Columbia, including General Electric Distributing Corporation, a wholly-owned subsidiary of GE (R(I) 26; 31; ¶¶ 18, 43).

4. GE's fair trade agreements provide (R(I) 40, 42):

> "Not for use in the District of Columbia or in the States of Florida, Missouri or Texas
>
> * * *
>
> This agreement shall not apply to sales made in any state in which the resale price control herein provided for is not lawful under any applicable Fair Trade Act or other statute, or rule of law or public policy."

There is no evidence of any fair trade agreement between GE and respondent or its parent.

5. In the course of the operation of the Washington store, respondent, knowing of the existence of GE's fair trade agreements, made sales by mail of GE merchandise to consumers in ten fair trade states at prices below those fixed in GE's fair trade contracts (R(I) 25-26, 31-32; ¶¶ 15, 20, 21, 45). These sales were all made pursuant to mail orders received at respondent's place of business in the District of Columbia directly from the consumers. The orders were all filled by shipments of the goods, in original factory cartons, directly to the consumers from the District of Columbia, either by mail or express. Some of such sales were made on a C.O.D. basis, but the great majority were effected pursuant to prepaid orders. In all cases respondent paid the mailing or shipping costs. (R(I) 25, 32; ¶¶ 16, 46).

6. Respondent's mail order forms, stating the terms of the sale transactions, (i) recited: "This order is

subject to acceptance by Masters Mail Order Company in, Washington, D. C."; (ii) advised: "All prices subject to change without notice"; (iii) expressed the customer's direction in these terms: "Please ship me the following merchandise"; (iv) bore the notation: "Sold To" immediately in front of the customer's name; and (v) provided that the vendor "allows you thirty days to exchange or refund your purchase by merely returning it in its original condition and carton." (R(I) 10, 32; ¶¶ 46, 47; see, e.g., R(II) 1, 3, 5, 8, 10, 13, 16, 19, 21; Exs. B, C, D, H, I, K, M, O, P). At least five such refunds have been made (R(I) 32-33; ¶ 48).

7. Respondent advertised in fair trade states through mailing pieces sent to prospective customers from the District of Columbia (R(I) 28-31; ¶¶ 29-33, 35, 39, 40).

8. Masters, Inc., (respondent's parent) furnished copies of respondent's mail order blanks only to consumers who sought, either in person or by mail, to buy GE appliances at the New York store of Masters, Inc., below fair trade prices. In such cases Masters, Inc. explained that such sales were illegal in New York, but could be effected by mail with respondent in Washington. In the case of mail orders of this kind, Masters, Inc. made a similar explanation and returned the prepayment, if any, to the customer. Masters, Inc. also furnished respondent's mail order forms to persons who specifically requested them. (R(I) 29-30, 34-37, 43; ¶¶ 35-38, 52-55, inclusive, Ex. F. R(II) 7, 24, 26; Exs. E, X, Y).

9. New York was the locale of respondent's parent corporation and top management (R(I) 26, 27, 28;

¶¶ 22, 23, 27, 28); of the smaller part of its purchases of respondent's products (R(I) 26, 31; ¶¶ 18, 43); of the preparation of its advertising materials, which usually were paid for in the first instance by respondent's parent and subsequently charged to respondent (R(I) 28-29, 30-31; ¶¶ 29-34, 39, 40); and of the procurement of its mailing lists (R(I) 29, ¶¶ 31-32). Respondent's checks, drawn on its bank account in the District of Columbia, were signed by its president, who was also the president of its parent (R(I) 27-28; ¶ 26). Respondent's local supervisor in Washington, D. C. had discretion in effectuating the policies adopted by his superiors (R(I) 28; ¶ 28).

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the decision below was clearly correct; raises no questions of sufficient importance to warrant review by the Court; is in harmony with the result unanimously reached by the only other Court of Appeals which has considered the same problem; and is in accord with the legislative policy of Congress towards the District of Columbia.

1. The Majority Below Correctly Applied the McGuire Act and the Case Presents No Question Calling for Adjudication by This Court.

The critical provision of the McGuire Act, to which the succeeding sections refer back, is its subsection 5(a)(2), 66 Stat. 632, 15 U.S.C. § 45(a)(2). This lifts the interdiction of the federal antitrust laws from "contracts or agreements prescribing minimum or stipulated prices . . . for the resale of a commodity . . . when . . . lawful as applied to *intrastate* transactions under any statute. . . in effect in any State,

Territory, or the District of Columbia *in which such resale is to be made, or to which the commodity is to be transported for such resale*" (emphasis supplied). As its text thus is plain, subsection 5(a)(2) does not lift the ban of the antitrust laws unless the contract or agreement pertains to a "resale" of the described type—i.e., one which occurs in a state with a fair trade law.

The limited exemption thus granted by subsection 5(a)(2) is not extended in any manner by the succeeding provisions. Thus it is only as to "*such* contracts or agreements"—i.e., those described in the preceding subsection 5(a)(2)—that the succeeding subsection 5(a)(3) authorizes pursuit of state remedies for advertising, offering, or selling below the fixed prices. Pursuant to subsection 5(a)(2), "*such* contracts" are immunized from the Sherman Act only insofar as they cover a "resale" in a fair-trade state. Hence, by the express terms of subsection 5(a)(3), the federal sanction of state-created remedies, for enforcement of "such contracts", is likewise effective only where the challenged activities concern a "resale" in a price-fixed jurisdiction. In other words, the enforcement privilege is not granted unless the pertinent "resale" is of that character.

The same limitation is inherent in subsection 5(a)(4). It yields the federal supremacy over interstate commerce only for "contracts or agreements *as described in paragraph (2) of this subsection*" and for the enforcement of remedies "*as described in paragraph (3) of this subsection*" (emphasis supplied). Hence 5(a)(4) does not expand the permissible reach of state law beyond the limits stipulated by the preceding provisions.

It follows that if respondent's interstate mail order activities involve "resales" in the District of Columbia, a competitive price jurisdiction, the McGuire Act bars petitioner from exerting price control over those activities. On this record it is clear that District of Columbia resales are involved and that, in any event, the petition presents no question appropriate for review here.

More particularly, the majority below agreed that respondent conducts a *bona fide*, extensive retail business in the District of Columbia (Pet. 34 n. 4; 47), and this fact was not challenged by the dissent (*id.* p. 49 n. 1). Nor did either of the other judges express any disagreement with Judge Clark's view that in making "resales" to New Yorkers, respondent passed title to the subject goods in the District of Columbia. In such circumstances, respondent's challenged activities are beyond petitioner's reach, if there is any force at all in the McGuire Act's limitation of the scope of fair trade agreements to resales in fair trade states.[2]

Apart from the merits, the case presents no question calling for the exercise of certiorari jurisdiction. So far as this respondent is concerned, the divergence in rationale between the majority judges involves a dialectical difference, not a decisional division. Both in reality rested decision on the same fundamental fact—that respondent conducted its business in a *bona fide* District of Columbia retail establishment. That fact underlay Chief Judge Clark's ruling for respondent, since he related the title-passing criterion to a place

[2] The legislative history supports the decision below, as the concurring judge noted (Pet. 43-45). See also *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co.*, 140 F. Supp. 165, 175-178 (D. Md. 1956), *aff'd* 240 F. 2d 684.

which "has a direct and substantial relation to the transaction" (Pet. 40). That same fact was necessarily decisive under Judge Waterman's hypothesis that the statutory issue turned on the "place where the seller of the goods is located" (*id.* at 43). Only through reversal of the conclusion that title passed in the District of Columbia would the analytical difference between the majority below assume decisional significance. An inquiry into that subject is not worthy of this Court's attention.

Neither is any generic issue, meriting this Court's consideration, projected by the minority view—that respondent's New York "'contacts'" subjected it to petitioner's price fixing agreements (Pet. 48-50). As shown by the dissenting opinion, the "contacts" in question all simmer down to the basic circumstance that this particular respondent is a subsidiary of a particular New York concern, enjoying certain business relations with its parent, rather than a "wholly independent out-of-state mail order house" (Pet. 49). Since the "contacts" rationale is based on facts peculiar to this litigant, its review by this Court would resolve no question of general importance.

The prevailing judges below were correct in their joint conclusion that the "contacts" theory was beside the point (Pet. 34-35, 46-47). As they perceived, nothing in the McGuire Act, or its history, indicates a Congressional design to define the statutory reference to the place of "resale" in terms of such extrinsic matters as the vendor's corporate affiliations; or the residence of its officers; or the locale of its ancillary promotional activities in procuring mailing lists and printing advertising matter.

Furthermore, the adoption of the "contacts" theory would lead to a highly uneven and unpredictable application of the McGuire Act. On that basis, its impact might vary among neighboring retailers in the same competitive price jurisdiction, selling the same merchandise on identical terms, simply because of differences in their auxiliary operations or in their ownership characteristics. For example, the Best or Franklin Simon stores in the District of Columbia, being owned by New York concerns, might have different statutory responsibilities than would S. Kann Sons Co. or Woodward & Lothrop, as locally owned Washington retailers. And Garfinckel's, a locally owned store with New York subsidiaries, might fit into still another category. The point here is that the McGuire Act is framed in terms of the place of sale—not the seller's personality.

2. The Courts of Appeals are in Harmony on the Matters in Issue.

There is only one other Court of Appeals case in point. It was there unanimously held that this same respondent was not subject to Maryland's fair trade law, identical with New York's, in respect of its mail order business with Maryland residents. *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co.*, 240 F. 2d 684 (4th Cir. 1957). That opinion, like Judge Clark's opinion below (Pet. 32), emphasized the admonition of this Court, in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956), that the McGuire Act's loosening of the Sherman Act's price-fixing bar "must be construed strictly since resale price maintenance is a privilege restrictive of a free economy" (240 F. 2d at 689).

3. The Decision Below is in Accord With the Legislative Policy of Congress Towards the District of Columbia.

The impropriety of subjecting respondent's challenged activities to fair trade control is evident from Congress' repeated rejection of proposals to enact a resale price maintenance law for the District of Columbia. At least seven such bills have been introduced, three of them since the passage of the McGuire Act.[3] All have been rejected, and latterly in the face of the plea of fair trade proponents "that mail order houses were using the District of Columbia as a haven of refuge from which to invade the fair-trade states" (*Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*, 140 F. Supp. 165, 178 (D. Md. 1956),[4] affirmed 240 F. 2d 684 (4th Cir. 1957)).

The foregoing history evinces a conscious Congressional purpose to allow full sway to the Sherman Act in the District of Columbia and reinforces the lower court's ruling that the McGuire Act forecloses fair trade interference with respondent's interstate mail order business. That statute necessarily controls this case, however far the states may attempt to stretch their statutes. "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme,

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[3] H.R. 8175, 75th Cong., 1st Sess. (1937); H.R. 9873, 75th Cong., 3d Sess. (1938); H.R. 3838, 76th Cong., 1st Sess. (1939); S. 1417, 78th Cong., 1st Sess. (1945); S. 3297 and H.R. 8591, 83rd Cong., 2d Sess. (1954); S. 270, 84th Cong., 1st Sess. (1955).

[4] The evident reference was to Hearings, Senate Committee on the District of Columbia, on S. 3297, 83d Cong., 2d Sess., and particularly to the statement of the General Counsel of the Sunbeam Corporation, a leading fair trade manufacturer. See, e.g., *Sunbeam Corp.* v. *Wentling*, 185 F. 2d 903 (3d Cir. 1950); *Sunbeam Corp.* v. *Payless Drug Stores*, 113 F. Supp. 31 (N.D. Cal. 1953).

absent approval by Congress" (*Schwegmann Bros.* v. *Calvert Distillers Corp.* 341 U.S. 384, 386 (1951)).[5]

The requisite Congressional approval is lacking as to District of Columbia vendors. Consequently, if petitioner's agreements were applied here, respondent "would be required to conduct its business under compulsion, and by virtue of contracts to which it is not and could not legally be a party, in a manner it could not voluntarily and directly contract to do" (*Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co., supra*, 140 F. Supp. at 174).

"In this setting, moreover, there is a special constitutional barrier against subjection of the instant transactions to price fixing agreements resting on New York law. This is Article I, Section 8, clause 17 of the federal Constitution, whereby Congress is invested with exclusive legislative power over the District of Columbia. Compare *Pacific Coast Dairy, Inc.* v. *Department of Agriculture*, 318 U.S. 285 (1943).

4. There Is No Conflict With New York Law.

There is no substance in petitioner's suggestion that the decision below is opposed to *Raxor Corp.* v. *Goody*, 307 N.Y. 229, 120 N.E. 2d 802 (1954). The question there was whether New York's fair trade requirements could be applied to out-of-state mail order sales by a local vendor. This was the opposite situation from the one at bar. Citing as its sole authority the ruling of Judge Chesnut in *Sunbeam Corp.* v. *Mac-*

[5] As an exception to the Sherman Act, the McGuire Act is not to be extended "by implication" (*United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939)), and is effective only to the extent that there is a "clear repugnancy" between the two laws (*State of Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 457 (1945)).

Millan, 110 F. Supp. 836 (D. Md. 1953), that the McGuire Act permitted Maryland to regulate the "export" mail order sales of resident merchants, the New York Court sustained similar coverage. 307 N.Y. at 240, 120 N.E. 2d at 805-806. But that holding does not reach this case, as is indicated by the subsequent opinion of Judge Chesnut in *Revere Camera Co.* v. *Masters Mail Order Co.* (this respondent), 128 F. Supp. 457 (D. Md. 1955), involving the same activities challenged here. He there pointed out that the *MacMillan* decision did not govern "the factual situation presented in the instant case with respect to the sale of goods from Washington into Maryland" (128 F. Supp. at 462). That the New York Court of Appeals would itself recognize the same distinction is indicated by its holding in *People ex rel. Kirkman* v. *Amringe*, 266 N.Y. 277, 194 N.E. 754 (1935).

Neither is there any force in the claim that conflict with New York law is occasioned by the holding below that the McGuire Act authorizes enforcement action against discount advertising only when related to a resale in a fair trade state (Pet. 11). The contention here is that respondent's advertising was unlawful "whether or not the sales were actually consummated in New York" (Pet. 11). The supporting argument is that this construction is compelled by the Feld-Crawford Act's "use of the disjunctive ('advertising, offering for sale *or* selling') in the statutory language" (*ibid.*).

The short answer lies in the following disclaimer incorporated in petitioner's form of fair trade agreement (R. 42; Ex. Z):

> "This agreement shall not apply to sales made in any state in which the resale price control herein

> provided for is not lawful under any applicable Fair Trade Act or other statute, or rule of law or public policy."

It follows that if respondent's sales were "'consummated" in the District of Columbia, there was no applicable resale price agreement, and thus no governing fair trade prices, regardless of the scope of the New York statute's advertising coverage. That statute is not mandatory or self-executing. It can be brought into play only by the effectuation of a fair trade agreement.

Next, whether or not New York law accords independent force to the references to "advertising, offering for sale or selling", the Court below correctly held that "the wording of the McGuire Act suggests that the three are to be handled together" (Pet. 35). For as we have shown, p. 10, *supra*, state remedies against discount advertising and offers are sanctioned by the McGuire Act only insofar as they enforce agreements governing "resales" in a fair trade jurisdiction. This authorization does not permit a fair trade state or its courts to interfere with advertising or offers pertaining to resales in free jurisdictions. The "local-dissemination" of advertising concerned with interstate sales is of itself commerce within the meaning of the Sherman Act. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 151 (1951). "Where compliance with the injunction of the state court would result in the restraint of trade interdicted by the Sherman Act, the injunction must be vacated in keeping with the Supremacy Clause of the United States Constitution . . . It goes without saying that a continuing injunction commanding adherence to a price-maintenance arrangement in violation of the

Sherman Act has no legal force or vitality" (*Johnson & Johnson* v. *Weissbard*, 11 N.J. 552, 556, 95 A. 2d 403, 405-406 (Sup. Ct. 1953)).

Actually petitioner's instant argument overlooks the full text of the Feld-Crawford Act itself and thus misconceives its meaning. Its central provision is Section 369-a, authorizing the execution of contracts fixing minimum resale prices. Section 369-b is the only one in which advertising is mentioned. This is a remedial provision which refers back to prices "stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a" (Pet. 26). By elementary principles the prices to be charged on sales made in other jurisdictions are not "stipulated" in a price-fixing contract authorized by New York law, as petitioner recognizes by its own disclaimer, set out above. As Judge Clark noted (Pet. 35-36), this construction, correlating the advertising, offering and selling references in the New York statute, finds support in the cases construing the identical Maryland Fair Trade Act. *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co., supra*, 240 F. 2d 684, 687-688 (4th Cir. 1957); *Revere Camera Co.* v. *Masters Mail Order Co.*, 128 F. Supp. 457, 461, 462 (D. Md. 1955). Inasmuch as respondent's advertising and offers refer solely to the terms of District of Columbia sales, it follows that the New York statute does not itself purport to reach them.

Petitioner's "disjunctive" argument is also pierced by New York decisional authority, as reflected by *People ex rel. Kirkman* v. *Amringe, supra*, 266 N.Y. 277, 194 N.E. 754 (1935). The question there concerned the scope of a New York statute broadly prohibiting any participation in the transaction of busi-

ness by a foreign insurance corporation which had not qualified to do business in New York. In rejecting its application to New York residents, who had locally serviced a policy issued by a non-qualified District of Columbia insurer, the Court ruled that the statute "does not cover aid extended *here* to an insurance company in the lawful transaction of its business elsewhere" (266 N.Y. at 281, 194 N.E. at 755; emphasis supplied).[6] There is no basis for according the Feld-Crawford Act a longer reach by extending it to cover advertising related to sales which are lawful where made.

5. Petitioner's "Conflicts of Law" and "Economic Facts" Arguments Are Inapposite.

There is no merit in the claim that the court below erroneously failed to apply the conflicts of law principles applicable to tort actions. This is only a restatement of petitioner's argument, since it assumes the conclusion that respondent's interstate activities constituted a "wrong" in New York. This conclusion is not only foreclosed by the McGuire Act, but is also incompatible with the New York statute itself. Judge Clark ruled that the Feld-Crawford Act did not cover the transactions in issue (Pet. 37) and the identical

[6] It is not material that the statute there construed was penal and therefore subject to the doctrine of strict construction. The same is true of fair trade acts, as statutes in derogation of the common law. *United States* v. *McKesson and Robbins, Inc.*, 351 U.S. 305, 316 (1956); *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U.S. 183, 188-189, 190 (1936); *Venable* v. *J. Engel & Co.*, 193 Md. 544, 549, 69 A. 2d 493, 495 (Ct. of App. 1949); *Pazen* v. *Silver Rod Stores, Inc.*, 130 N.J. Eq. 407, 413, 22 A. 2d 237, 240 (1941); *General Electric Co.* v. *R.H. Macy & Co.*, 199 Misc. 87, 95-96, 103 N.Y.S. 2d 440, 449 (Sup. Ct. 1951), appeal dismissed 278 App. Div. 939, 105 N.Y.S. 2d 1003 (1st Dep't. 1951).

Maryland statute was likewise held inapplicable to this respondent's mail order business in *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co.*, *supra*, 240 F. 2d 684 (4th Cir. 1957). On that ground—i.e., the lack of coverage under state law—the trial court in the latter case rejected this same "conflicts" argument. See 140 F. Supp. 165, 179-180 n. 45.

The various authorities invoked by petitioner on the conflicts point are not helpful. They are concerned either with wholly different federal statutes, or with the permissible constitutional scope of state statutes in the absence of an overriding federal enactment, or with the application of conflicts of law principles in the absence of any applicable legislation whatever, state or federal. None has any bearing here.[7]

Miller Bros. Co. v. *Maryland*, 347 U.S. 340 (1954) hardly supports petitioner's plea in this case. The Court there condemned, on due process grounds, the effort of the State of Maryland to exert extraterritorial force in the application of its taxing statute, in

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[7] The only cited precedent even remotely related to the issue at hand is *State* v. *Davis*, 77 W. Va. 271, 87 S.E. 262 (1915). But that case is readily distinguishable. The federal statute there involved was the Webb-Kenyon Act. That was a federal contraband statute, prohibiting the "shipment or transportation [of liquor] into any other State" in violation of its laws. 37 Stat. 699; see note following 27 U.S.C.A. § 1. The McGuire Act contains no such contraband provision. It is more akin to the earlier Wilson Act in the liquor field. This allowed a prohibition state to control out-of-state liquor "upon arrival . . . in the same manner as though . . . produced in such State." 26 Stat. 313; see note following 27 U.S.C.A. § 1. Under that grant of authority the states were powerless to interfere with deliveries of liquor to local residents, whether made pursuant to C.O.D. or prepaid orders. *Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438 (1898); *Adams Express Co.* v. *Kentucky*, 206 U.S. 129 (1907).

circumstances strikingly similar to those at bar. The holding there repudiates plaintiff's position, since it is familiar and long established doctrine that the reach of state power is broadest in the tax field, as indeed that case expressly recognized. See 347 U.S. at 342; cf. *New York, L.E. & W.R. Co.* v. *Pennsylvania*, 153 U.S. 628, 646 (1894).

6. Conclusion

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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